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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 769

ROSEMOND M. PHILLIPS,
Petitioner,

vs.

GEORGE W. PHILLIPS,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, the Third Appellate District Thereof

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Brief of Respondent in Opposition to Petition for Certiorari

Dissatisfied with the outcome of her divorce case, petitioner seeks review here upon the assertion that alleged bias of the trial judge violated her rights under the Fourteenth Amendment. The courts below found, *as a fact*, that there was no bias, and the legal claim that, *if* there were bias, there was a violation of the Fourteenth Amendment, was not "specially set up or claimed" below. 28 U.S.C. § 1257(3).

OPINIONS BELOW

The opinions after the first trial are reported at 236 P.2d 816 and at 41 Cal. 2d 869, 264 P.2d 926, and the opinion after the retrial at 152 A.C.A. 617, 313 P.2d 630. The denial of hearing by the Supreme Court of California was without opinion.

STATEMENT

Instead of the transcript of record required by Rule 21(1), petitioner has presented to this Court, as the record, mere snatches of a proceeding which spans almost ten years. We therefore summarize the proceedings.

The cause was tried twice by the same judge. Although the petition asserts (p. 6) that the record of the first trial "abounds with evidence" of bias "at all times", petitioner never made that claim during the trial, on motion for new trial, on appeal from the judgment entered after that trial, or in ancillary mandamus proceedings. See *Phillips v. Phillips,* 236 P.2d 816; *Phillips v. Phillips,* 41 Cal. 2d 869, 264 P.2d 926.

The Supreme Court of California reversed that judgment, upon substantive principles of divorce law, for retrial. The retrial record embraces about 1000 pages from which petitioner gleans the purported record in this Court.

Petitioner *now* complains of observations of the trial judge made in open court, four months *before* the retrial, as showing bias (Pet. p. 4). But petitioner then went to trial without claiming bias, although under California law a litigant must assert a claim of disqualification at the earliest practicable opportunity, "and in any event before the commencement of the hearing of any issue of fact." Cal. Code Civ. Proc. § 170(5); *Keating v. Superior Court,* 45 Cal. 2d 440, 446, 289 P.2d 209, 213.*

The first claim of bias came only after four witnesses had testified at the retrial. Thereafter, petitioner began formal disqualification proceedings (Cal. Code Civ. Proc. § 170(5)). The trial judge

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*As stated in *Keating, supra:*

> "The reason for requiring a prompt claim of bias is that a party should not be allowed to play fast and loose with the administration of justice by deliberately refraining from raising an objection, on the chance that he might get a favorable decision and still be free to urge the objection as grounds for upsetting an unfavorable judgment."

Federal law is the same. 28 U.S.C. § 144; *Laughlin v. United States,* 151 F. 2d 281, 284 (D.C. Cir.), cert. den. 326 U.S. 777.

denied the charge of bias under oath, and the Chief Justice of the State of California assigned another judge who tried the issue of bias and determined it adversely to petitioner. No immediate appellate review was sought, as might have been, *Keating v. Superior Court, supra,* nor after judgment in the cause was any motion for new trial made on the ground of lack of "a fair trial", as might have been (Cal. Code Civil Proc. § 657(1)). On appeal from the judgment, the Court below, after having "carefully examined the entire record", found, as a fact, that the claim of bias was "so lacking in merit" as not to warrant discussion. *Phillips v. Phillips,* 152 A.C.A. 617, 621, 622; 313 P.2d 630, 632, 633. The Supreme Court of California then denied a hearing.*

At no time in the trial court was there any reference to either the Fourteenth Amendment or the Federal Constitution, either orally or in any pleading, paper, or brief.

DISCUSSION

1. The decision rests on an adequate non-federal ground.

The courts below found as a fact that there was no bias. This involves an appraisal of the record, but petitioner has not even brought the record before this Court. With this finding, there is no semblance of a constitutional question.

2. No federal question was raised below.

Contrary to this Court's Rule 23(b), the petition fails to state when and in what manner the federal question was raised. As noted above, it was never raised and thus never "specially set up or claimed". 28 U.S.C. Sec. 1257(3); *Chicago Indianapolis etc.*

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*The Supreme Court of California is fully conscious of the rights of litigants to an impartial trial, and frequently reviews the question. E.g., *Keating v. Superior Court,* 45 Cal. 2d 440, 289 P.2d 209; *Bompensiero v. Superior Court,* 44 Cal. 2d 178, 281 P.2d 250; *Guardianship of Jacobson,* 30 Cal. 2d 312, 182 P.2d 537.

Ry. Co. v. McGuire, 196 U.S. 1[illegible]8; *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291; *Jacobi v. Alabama,* 187 U.S. 133; *Bailey v. Anderson,* 326 U.S. 203, 206.

During the entire proceeding neither the Fourteenth Amendment nor any federal case was ever cited or mentioned. And the first and only reference to the Federal Constitution was the following in petitioner's Reply Brief on the second appeal:

> "The constitutions of the State of California and the United States of America protect a person in his or her property ownership and compel an appellate tribunal to correct judgments such as the judgment from which this appeal has been taken in order to safeguard the property interests of the people."

This generality failed to raise any federal question. *Herndon v. Georgia,* 295 U.S. 441; *Harding v. Illinois,* 196 U.S. 78, 86; *Thomas v. State of Iowa.* 209 U.S. 258, 263; *Bowe v. Scott,* 233 U.S. 658, 665.

CONCLUSION

We respectfully submit that the petition should be denied.

Dated: February 19, 1958.

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